

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

SA.No. 884 of 1994(E)

**AS.9/1989 OF SUB COURT, TIRUR,
OS.78/1985 OF MUNSIFF COURT.,PARAPPANANGADI.**

APPELLANTS/ APPELLANTS/ PLAINTIFFS:

1. KODALKUZHI MOHAMMEDKUTTY'S
CHILDREN VEERAN.
2. -DO- SAFIYA.

**ALL ARE RESIDING AT PALLIKKAL AMSOM, PUTHUR DESOM,
ERNAD TALUK, MALAPPURAM DISTRICT.**

**BY ADV. SRI.P.N.KRISHNANKUTTY ACHAN(SR.),
ADV. SMT.K.R.DEEPA.**

RESPONDENTS/ RESPONDENTS/ DEFENDANTS:

- *1. KODALKUZHI VEERAN MOIDEEN'S
DAUGHTER AYAMMA UMMA. *(DIED).
2. KODALKUZHI KADISSA UMMA'S
CHILDREN BEEPATHUMMA.
- **3. -DO- AMINAKUTTY UMMA, -DO- **(DIED).
4. KODALKUZHI UNNEEYA UMMA'S
CHILDREN KADISSAKUTTY.
5. AYISAKUTTY, -DO-.
6. KODULKUZHI MUHAMMEDKUTTY'S WIDOW
THEETHUPATHUMMA.

S.A. NO. 884/1994:

7. SON MOHAMMED MUSTAFA (MINOR),
14 YEARS BY GUARDIAN R6 MOTHER)
R1 RESIDING IN VELIMUKKU AMSOM AND DESOM,
TIRUR TALUK R2 TO 3 IN PALLIKKAL AMSOM
KARIPUR DESOM, ERNAD TALUK,
R5 IN KARIMARAKKAD AMSOM,
VAZHAKAD DESOM, ERNAD TALUK,
R6 AND 7 IN TIRURANGADI AMSOM,
TIRUR TALUK.

****R.3 - DIED. LRs 8 TO 13 IMPEADED:**

- **8.** FATHIMA ZUHARA,
W/O. MUHAMMEDKUTTY @ BAVU,
KARAMANANGAL HOUSE,
P.O. PARAMBIL PEEDIKA,
(VIA) VELIMUKKU,
MALAPPURAM DISTRICT.
- **9.** ABDU NAZAR, S/O. AMINAKUTTY UMMA,
VADAKKATUPURAM HOUSE,
MELANGADI.P.O., VIA KONDOTTI.
- **10.** ABDU SAMAD, S/O. AMINAKUTTY UMMA,
VADAKKATUPURAM HOUSE,
MELANGADI.P.O., VIA. KONDOTTI.
- **11.** MUHAMMED MUSTHAF, A,
S/O. AMINAKUTTY UMMA,
VADAKKATUPURAM HOUSE,
MELANGADI.P.O., VIA. KONDOTTI.
- **12.** ABDUL GAFOOR, S/O. AMINAKUTTY UMMA,
VADAKKATUPURAM HOUSE,
MELANGADI.P.O., VIA. KONDOTTI.
- **13.** MUHAMMED SHIHAB,
S/O. AMINAKUTTY UMMA,
VADAKKATUPURAM HOUSE,
MELANGADI.P.O., VIA KONDOTTI.

****SUPPLEMENTAL RESPONDENTS 8 TO 13 ARE IMPEADED
AS LRs OF DECEASED 3RD RESPONDENT AS PER ORDER
DATED 25/08/2006 ON I.A. 468/2004.**

S.A. NO. 884/1994:

***R.1- DIED, LRs IMPEADED:**

***14. K. AYISHA, D/O. LATE AYYAMMA UMMA,
C/O. ALI, KYTHAKATHU HOUSE,
MUNNIYOOR.P.O., KALIYATTAMUKKU,
(M.H. NAGAR), MALAPPURAM DISTRICT.**

***ADDL.R.14 IS IMPEADED AS LR_s OF DECEASED 1ST RESPONDENT AS PER
ORDER DATED 18/09/2007 IN I.A. 1609/2007.**

**BY ADV. SRI.T.KRISHNANUNNI,
SRI.O.K.MURALEEDHARAN,**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 07/11/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 884 OF 1994

Dated 7th November 2007

J U D G M E N T

Plaintiffs in O.S.78/1985 on the file of Munsiff court, Parappanangadi are the appellants. Defendants are respondents. On the death of first respondent, fourteenth respondent was impleaded as his legal heir. On the death of third respondent, respondents 8 to 13 were impleaded. Appellants instituted the suit seeking a decree for partition and separation of 9/36 shares in the plaint B schedule properties. Plaint B schedule properties are two items of property having an extent of 16.26 hectores in survey No.480/1, 480/3 and 480/4 of Pallickal village. Plaint B schedule properties originally belonged to Pavarutty. On his death it devolved on his children Veeran Moideen and Kammukutty. Veeran Moideen had three daughters. Kathissa Umma, Unneeya Umma and first defendant. On the death of Kammukutty her rights devolved on his son Mohammedkutty. Mohammedkutty had married Kathissa Umma daughter of Veeran Moideen.

Defendants 2 and 3 are their children. Mohammedkutty had married Kunhipathumma and thereafter sixth defendant Thithupathumma. Plaintiffs 1 and 2 are the children of Kunhipathumma and seventh defendant is son of sixth defendant. It is admitted case that under Ext.A1 registered kanam avadhi assignment deed executed on 15/3/1952 in favour of Pathummakutty Umma, two items of properties were transferred. Assignee Pathummakutty Umma was admittedly put in possession of the said properties. Plaintiffs would contend that though Ext.A1 is styled as kanam assignment deed, it is a deed of conditional sale whereunder properties were mortgaged in favour of Pathummakutty Umma for Rs.1,000/- which was received for the marriage of first defendant and mortgage was to be redeemed within one year from that date or within six years from the expiry of one year. Under Ext.A2 registered partition deed dated 7/2/1964, all the legal heirs of Veeran Moideen and Kammukutty divided the properties and properties were separately allotted. Case of appellants/plaintiffs is that Ext.A2 partition deed was entered into as Ext.A1 mortgage was redeemed in the name of third defendant and it was decided by co-owners that all the properties are to be divided. The plaintiffs

would contend that subsequently properties obtained by legal heirs of Mohammedkutty under Ext.A1 partition deed where divided in 1980 under Ext.B1 partition deed and subsequently properties set apart to the share of third defendant and her sisters were divided under Ext.B4. plaintiffs would contend that Ext.B2 assignment deed obtained from the assignee under Ext.A1 was for and on behalf of all the co-owners and therefore plaint schedule properties are available for partition and they are to be divided into 36 equal shares and 9 shares are to be allotted to the appellants. Third defendant resisted the suit contending that plaint B schedule properties though originally belonged to Veeran Moideen and Kammukutty under Ext.A1, was assigned in favour of Pathummakutty Umma and thereafter it was purchased by third defendant for valuable consideration and other defendants or plaintiffs have no right over said property and therefore plaint schedule properties are not available for partition. Learned Munsiff on the evidence of PW1, DW1, Exts.A1, A2 and B1 to B12 dismissed the suit holding that Ext.A1 is a sale deed and not a mortgage deed and therefore appellants are not entitled to a share. Appellants challenged the decree and judgment before Sub court, Tirur in A.S.9/1989.

Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in this appeal.

2. Appeal was admitted formulating the following substantial questions of law.

1) Whether transaction Ext.A1 is a mortgage by conditional sale.

2) Whether transfer under Ext.B3 is to a co-mortgager only.

3) Whether certificate of purchase (Ext.B10) shall ensure the benefit of all the co-owners.

3. Learned Senior counsel appearing for appellants and learned counsel appearing for third respondent were heard.

4. Learned Senior counsel relying on the decision of the Apex courts in Chunchun Jha v. Ebadat Ali (AIR 1954 SC 345), Indira Kaur and others v. Sheo Lal Kapoor (AIR 1988 SC 1074), Chennammal v. Munimalaiyan and others (AIR 2005 SC 4397) and Ramlal and another v. Phagua & Ors. (AIR 2006 SC 623) argued that Ext.A1 is not a sale but a mortgage by conditional sale. Learned Senior counsel argued that under Ext.A1 properties were mortgaged for Rs.1,000/- and it specifically provided that if the

mortgage money is repaid within a period of six years, after the expiry of one year, mortgagee shall re-convey the property to the mortgagors for the same consideration which was fixed as the consideration for re-conveyance and so Ext.A1 can only be a mortgage by conditional sale and not an outright sale. Learned Senior counsel also argued that under Ext.A2 partition deed properties were divided between co-owners and the property covered under Ext.A1 was allotted as item numbers 17 and 18 which was jointly allotted to executant numbers 10 to 14 under whom appellants and respondents are claiming title and therefore Ext.B3 obtained by third respondent shall ensure for and on behalf of co-owners and as Ext.A1 mortgage was redeemed under Ext.B3, the properties are available for partition between all co-owners and consideration for Ext.B3 was paid utilising the income obtained from the co-ownership property and redemption was for and on behalf of all the co-owners and hence plaint schedule properties are available for partition and courts below did not properly appreciate the evidence. Learned counsel appearing for contesting respondent argued that very suit was framed on the allegation that Ext.B3 assignment deed was obtained before the properties

were divided under Ext.A2 and utilising the income from the co-ownership property and when Ext.B3 was on 6/5/1964 the properties were divided earlier on 7/2/1964 under Ext.A2 and therefore case that properties were divided with the income from co-ownership properties and Ext.A2 partition was entered into because Ext.B3 assignment deed was obtained in the name of third respondent cannot be correct. Learned counsel also pointed out that description of the properties covered under Ext.A1 do not tally with the description of properties covered under item No.17 and 18 of Ext.A2 partition deed and item No.17 and 18 are the remaining portions of item No.9 and 10 and from Ext.A1 it cannot be said that either the properties covered under Ext.A1 are item No.18 and 18 or 9 and 10 and therefore appellants cannot claim share on the basis of Ext.B3. Learned counsel also argued that if the case of appellants was that properties were not divided, then the question whether plaint schedule properties are available for partition can only be decided in a properly instituted suit impleading all the legal heirs of Veeran Moideen and Kammukutty and that question cannot be decided in this suit and on the evidence courts below rightly found that plaint schedule properties are available for partition as

sought for.

5. On hearing the learned counsel and on going through the records and evidence, I do not find that it is necessary to go into the question whether Ext.A1 is a mortgage or a conditional sale as canvassed by learned Senior counsel in this appeal. Plaint allegations show that Ext.A2 partition deed was entered into after Ext.B3 assignment deed obtained by third respondent. Allegation was that as Ext.B3 was obtained in the name of third respondent, parties decided that it is necessary to divide all the properties including the properties obtained under Ext.B3 and therefore Ext.A2 partition deed was entered into. As rightly pointed out by the learned counsel appearing for respondents the said case cannot be true. When Ext.B3 assignment deed was obtained by third respondent only on 6/5/1964, Ext.A2 partition deed was entered into three months earlier on 7/2/1964. Therefore, purpose of division of the property under Ext.A2 can never be Ext.B3 assignment deed obtained by third respondent as pleaded in the plaint. If under Ext.A2 partition deed all the properties were divided inclusive of the property outstanding under Ext.A1, then in the ordinary course, when the outstanding liabilities are

shown as B schedule in Ext.A2, the liability under Ext.A1 if it was a mortgage would have been shown. But Ext.A2 does not show that liability. Written statement of third respondent show that property covered under Ext.A1 was not intended to be divided under Ext.A2 and was not divided under Ext.A2.

6. Question is whether Ext.A1 properties were divided under Ext.A2 partition deed. Though item No.9 and 17 are two parts of the same item No.10 and 18 properties, the description of the properties under Ext.A2 and Ext.A1 do not tally. So also measurements and extent. From the description of the properties, arguments advanced by the learned counsel appearing for respondents was that properties which were divided under Ext.A1 are the remaining properties excluding the property covered under Ext.A1. It cannot be ruled out. In any event there is no evidence to prove that either item No.9 and 17 or item No.10 and 18 are the properties covered under Ext.A1. Therefore, on the strength of Ext.A2, appellants cannot be heard to contend that plaint schedule properties were available for partition. Even if, Ext.A1 property was also divided under Ext.A2 partition deed and they are item Nos.9,10, 17 and 18, it is seen from Ext.A2 that item No.9

and 10 were jointly allotted to executant Nos.1 and 2 and item Nos.15 to 18 were jointly allotted to executant No.10 to 14. If that be so, it cannot be said that Ext.B3 was obtained by third respondent for the co-owners. When the extent covered under Ext.A1 would be more than 4 acres, total extent of item numbers 9,10, 17 and 18 of Ext.A2 is 3 acres 20 cents. Therefore property covered under Ext.A1 should be more than what was divided under Ext.A2. More over, if property allotted as item No.17 and 18 under Ext.A2 are portions of Ext.A1 property, appellants cannot contend that Ext.B3 was obtained on their behalf. When it was argued that plaint schedule properties are item Nos.17 and 18 of Ext.A2 partition deed, pleading in paragraph 5 to 8 of plaint is that it is only item No.10. If it is item No.10, that item was allotted to executant Nos.1 and 2 of Ext.A2. In that event appellants cannot claim any right over the same. In such circumstances, I do not find any reason to interfere with the findings of courts below that appellants are not entitled to claim a share in plaint B schedule properties. Appeal is dismissed. No cost.

**M.SASIDHARAN NAMBIAR,
JUDGE.**

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.884 OF 1994

7th November 2007

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